FILED

JUL 27 2001

OFFICE OF THE CLERK

No. 00-1937

In the Supreme Court of the United States

LARRY G. MASSANARI,
ACTING COMMISSIONER OF SOCIAL SECURITY,
PETITIONER

v.

CLEVELAND B. WALTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent does not dispute that the decision below squarely conflicts with decisions of the Eighth and Tenth Circuits on the first question presented. Nor does respondent seriously dispute the decision's enormous fiscal and programmatic consequences for Social Security. Instead, respondent devotes most of his brief to defending the court of appeals' decision on the merits. That defense, however, is unpersuasive, does not undermine the decision's significance, and does not decrease the need for this Court's review.

A. 1. The first question presented is whether a claimant is entitled to disability benefits under the Social Security Act (Act), 42 U.S.C. 301 *et seq.*, if, at the time his claim for benefits is adjudicated, it is known that his disability (*i.e.*, the inability to engage in substantial gainful activity on account of a medical impairment) neither lasted nor can be expected to last for 12 consecutive months. Invalidating the Commissioner's longstanding construction of the Act, the court of appeals held that the Act does not require—and indeed precludes the Commissioner from requiring—that the *disability* last or be expected to last at least 12 months. Pet. App. 7a-

8a, 10a-11a. Instead, the court held, only the *impairment* that gives rise to the inability to work need last or be expected to last for 12 months. *Id.* at 8a, 11a.

As the petition explains (Pet. 15-17), the Tenth and Eighth Circuits have reached precisely the opposite conclusion. In *Alexander* v. *Richardson*, 451 F.2d 1185 (1971), cert. denied, 407 U.S. 911 (1972), the Tenth Circuit held that an individual is not entitled to disability benefits unless *both* the inability to engage in substantial gainful activity and the impairment giving rise to that inability last 12 months. *Id.* at 1186 ("Inability to engage in any gainful activity and the impairment which causes it cannot be separated. The two components of disability must exist at the same time."). Even where an impairment is permanent, that court held, the claimant "is not entitled to benefits" if "he is able to engage in any gainful activities within a year from his injury." *Ibid.* The Eighth Circuit followed *Alexander* in *Titus* v. *Sullivan*, 4 F.3d 590, 594-595 (1993).

Seeking to minimize the significance of that conflict, respondent relies (Br. in Opp. 8-9) on *Newton* v. *Chater*, 92 F.3d 688, 694 (8th Cir. 1996), and *Walker* v. *Secretary of Health & Human Services*, 943 F.2d 1257, 1260 (10th Cir. 1991). Neither *Newton* nor *Walker*, however, addressed whether the disability or merely the underlying impairment must last or be expected to last 12 months; and neither purported to overrule *Alexander* or *Titus*. Instead, *Newton* and *Chater* addressed the validity of the Secretary's trial work regulations, which are at issue in the second question presented. See pp. 8-10, *infra*; Pet. 23-26. Indeed, in both cases, the applicant's disability—his inability to work on account of his impairment—actually lasted 12 months, as respondent concedes. Br. in Opp. 8 (in both cases "the claimant's return to work actually occurred more than 12 months after onset"); see *Walker*, 943 F.2d at 1258; *Newton*, 92 F.3d at 690. Thus, neither case dealt with whether a claimant is entitled to benefits where, as here, he returns to work within

12 months of the alleged disability's onset and before his claim is adjudicated. In fact, *Newton* expressly recognized (contrary to the decision below) that the *disability*, and not merely the underlying medical impairment, must last 12 months. The payment of benefits, the court stated, is "conditioned * * * upon the passage of five consecutive months of [a] *disability lasting twelve continuous months*." *Newton*, 92 F.3d at 694 (emphasis added).

2. The court of appeals' interpretation of the Act not only creates a circuit conflict, but also would, if allowed to stand, have enormous fiscal and administrative consequences. As the petition explains (at 18), the Commissioner's actuaries estimate that the cost of complying with the Fourth Circuit's decision would be approximately $9.8 billion over the next 10 years. By dramatically relaxing a core requirement for showing disability, moreover, the court of appeals' decision invites a substantial increase in the number of applications the Commissioner must process, which already exceed 2 million annually.[1] Although respondent complains that the financial projections are based on the assumption that beneficiaries would receive benefits indefinitely, that is not true; the estimates account for the average duration of a benefits award. Besides, an assumption that beneficiaries would receive benefits indefinitely is hardly unjustified. The Commissioner's authority to terminate benefits for "medical improvement" under 42 U.S.C. 423(f)(1) is greatly circumscribed by the court of appeals' decision. Where an individual already could work notwithstanding his impairment by

[1] The Commissioner's estimates may prove conservative because they do not attempt to account for the increase in applications that would be caused by the court of appeals' decision. See Pet. 18 n.5. Respondent maintains that claimants will not decide whether to apply for benefits based on a court decision. Br. in Opp. 14. But the number of applications the Social Security Administration (SSA) receives is directly linked to the number of people who qualify for benefits. By relaxing the requirements for disability benefits, the court of appeals necessarily increased the number of applications SSA must process.

the time the award is made, it would often prove difficult if not impossible to show further "medical improvement" to justify termination. See Pet. 19.

3. Unable to contest the existence of a circuit conflict or the fiscal significance of the decision below, respondent primarily argues that the decision is correct and that the Eighth and Tenth Circuits' contrary decisions in *Titus* and *Alexander* are not. The latter decisions, respondent asserts, "blur[] the distinction between the duration requirement and the severity requirement." Br. in Opp. 7. Echoing the analysis of the court of appeals, respondent argues that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" in 42 U.S.C. 423(d)(1)(A) must modify the word "impairment," not the phrase "inability to engage in any substantial gainful activity." Br. in Opp. 4; see also Pet. App. 7a-8a, 10a-11a. But that grammatical parsing of the statute hardly demonstrates *Alexander* and *Titus* to be incorrect, or the Commissioner's construction to be impermissible. To the contrary, respondent's construction ignores the fact that the definition of "disability" requires not only an underlying medical impairment that has lasted or can be expected to last for at least 12 months, but also an inability to engage in substantial gainful activity "by reason of" that impairment. 42 U.S.C. 423(d)(1)(A). The inability to work and the impairment giving rise to it thus are directly linked; it follows logically that their durations are linked as well. Indeed, when Congress amended the definition of disability by adding 42 U.S.C. 423(d)(2)(A) in 1967, it declared that an individual is "under a disability" and entitled to benefits "only if" his impairment is "of such severity" that it precludes all substantial gainful activity in the national economy. Respondent offers no reason why that severity requirement, which

is a condition precedent to the finding of disability, does not apply in each of the required 12 months of impairment.[2]

The Commissioner's construction, moreover, is fully consistent with respondent's grammatical parsing. After all, if one accepts that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" describes *only* the duration of the *impairment*, then the statute is at most silent or ambiguous regarding the duration of the inability to engage in substantial gainful activity that the impairment must produce. Thus, Congress has left a gap for the Commissioner to fill, and the Commissioner has reasonably determined that the disability should be durationally coextensive with the impairment. See 65 Fed. Reg. 42,774 (2000); Social Security Ruling (S.S.R.) 73-7c (Cum. Bull. 1973). That decision must be upheld under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), so long as it is permissible, as respondent concedes.[3] Here, the Commissioner's con-

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[2] Respondent cites regulations and legislative history that distinguish between the "severity requirement" and the "duration requirement." Br. in Opp. 7. There is, of course, a distinction between *how severe* an impairment must be (sufficiently severe to preclude all substantial gainful activity) and *how long* the impairment and resulting inability to work must last. The materials respondent cites are fully consistent with the Commissioner's view that both the impairment and the resulting disability must last at least 12 months.

[3] Respondent does not dispute that, if the Commissioner's construction is permissible, it must be upheld under *Chevron*; he merely disputes whether that construction is permissible. See Br. in Opp. 29-30. At the same time, however, respondent suggests that the Commissioner's current regulations are irrelevant because they were promulgated after the Administrative Law Judge resolved his claim. Br. in Opp. 5 n.1, 30 n.8. Respondent nowhere explains why that should make a difference where, as here, these new regulations—which are entitled to deference no matter when they were promulgated—merely restate the Commissioner's longstanding interpretation, see 65 Fed. Reg. at 42,774 (revisions "do not represent a change" and are "consistent with SSR 82-52"), and that interpretation is embodied in the Commissioner's final decision in the adjudication of respondent's case.

struction is clearly permissible: Nothing in the Act declares that there is no minimum duration requirement for the inability to work, and the Act's legislative history shows that Congress specifically intended to require that the *disability*—which is defined as the inability to work on account of the impairment—last or be expected to last at least 12 consecutive months. S. Rep. No. 404, 89th Cong., 1st Sess. 99 (1965) (benefits payable only if the claimant "has been or can be expected to be *totally disabled throughout a continuous period of 12 calendar months*" (emphasis added)); *ibid.* (benefits payable where the "*disability* has existed for 12 calendar months" or "the worker's *disability* will continue for a total of at least 12 calendar months" (emphasis added)). See also Pet. 21-22.

For similar reasons, respondent's reading contravenes Congress's intent because it converts Social Security into precisely the sort of short-term disability program Congress sought to avoid. See Pet. 21. Respondent attempts to answer that point by relying on the five-month waiting period under 42 U.S.C. 423(c)(2)(A). Br. in Opp. 11, 17-18. But Section 423(c)(2)(A) does not help respondent. That waiting period applies only to Title II's disability insurance program, and not to Title XVI's Supplemental Security Income (SSI) program, which uses the same definition of disability. See Pet. 5, 19. Consequently, under the court of appeals' decision, the Commissioner apparently must pay SSI benefits if an impairment of indefinite duration causes an inability to work of as little as a month. Congress could not have intended such a result.[4] Further, Congress clearly concluded

[4] Respondent suggests that the SSI program should not require an inability to work of *any* duration, citing regulations that permit disabled individuals to receive SSI benefits despite working. Br. in Opp. 12. Those regulations, however, say nothing about a waiting period, and apply only *after* the applicant has met the definition of "disability" through a 12-month inability to work, or a determination that the individual can be expected to be unable to work for 12 months. The regulations nowhere suggest that an individual may qualify for SSI benefits on account of a disability even if he returned to work *before* the 12-month period lapsed and *before* his claim was adjudicated. Respondent's further contention that Title XVI benefits are not at issue here, *id.* at 12 n.3, is also incorrect. Respondent sought benefits under both Title II and Title XVI, Pet. App. 39a, 52a; Resp. C.A. Br. 1, and the court of appeals understood both Title II and Title XVI benefits to be at issue, see Pet. App. 2a. More important, even if Title XVI benefits were not at issue in this case, respondent's and the court of appeals' construction of "disability" applies with equal force to that program, since Title II and Title XVI use the same definition of disability.

in 1965, when it enacted the current definition of disability in 42 U.S.C. 423(d)(1)(A), that even a six-month inability to work was the sort of short-term disability that should not qualify for benefits. See Pet. 21. Respondent's reliance on the five-month waiting period as sufficient protection for the program is inconsistent with that judgment.

In any event, respondent misconstrues the purpose of the five-month waiting period. Section 423(c)(2)(A) does not address whether an individual suffers from a disability of sufficient severity or duration to entitle him to benefits. Instead, it addresses the time at which *payments must begin* for a disability that qualifies under the Act. The waiting period is a cost-saving device predicated on the principle that, even with respect to a covered disability of 12 months or more, workers ought to rely on a source of protection other than Social Security disability insurance during the first five months of disability. Indeed, when Congress shortened the waiting period from six months to five in 1972, it recognized that that change would not alter the requirement that the *disability*—the inability to work on account of the medical impairment—last or be expected to last for at least 12 months. As the House Report explained, notwithstanding the one-month decrease in the waiting period, "[n]o benefit is payable * * * unless the *disability* is expected to last (or has lasted) *at least 12 consecutive months* or to result in

death." H.R. Rep. No. 231, 92d Cong., 1st Sess. 56 (1971) (emphasis added).[5]

B. Respondent devotes the bulk of his brief to the second question presented, see Br. in Opp. 8-10, 15-31, which is whether he was entitled to a trial work period. As the petition concedes (Pet. 26 n.10), the Commissioner's trial work regulations have not fared well in the courts of appeals. Seizing on that concession, respondent urges that review is unnecessary because the courts of appeals are in substantial agreement on the second question presented.

Respondent's contention, however, in no way undermines the need for review in this case because there concededly is a circuit conflict on the first question presented, which has enormous fiscal implications for the Social Security disability program. Moreover, the second question is closely interrelated with the first and the two warrant resolution together. Indeed, in this case, the court of appeals' resolution of the second question was a product of its decision on the first. As that court acknowledged, its conclusion that respondent was entitled to a trial work period was "conclusively settled" by its earlier conclusion that respondent was "disabled" and entitled to benefits notwithstanding his return to work within 12 months of the alleged disability's onset. Pet. App. 9a; Pet. 23 & n.8. That follows as a matter of logic as well. Under the Act, the right to a trial work period attaches only *if* the claimant is entitled to benefits. Pet. App. 9a. If the

[5] Respondent suggests that his interpretation "eliminate[s] short-term, transient disabilities" because "[s]ome impairments" will "never" prevent work while "other impairments" would "never" be expected to last 12 months. Br. in Opp. 11. But respondent ignores the large number of people who have *long-term* impairments that cause them to be unable to work for periods of less than twelve months. See, *e.g.*, *Alexander*, 451 F.2d at 1186 (example of individual who loses a hand). Indeed, many extremely common ailments (back injuries, etc.) may last a lifetime, but are debilitating only for short or intermittent periods. Under respondent's construction, such short-term disabilities would be compensable merely because the underlying impairment persists indefinitely.

individual's return to work within 12 months of the alleged disability's onset prevents him from being entitled to benefits, it necessarily prevents him from being entitled to a trial work period as well.[6] For that reason, respondent's reliance (Br. in Opp. 18-19) on the Eighth and Tenth Circuits' decisions in *Walker* and *Newton* is misplaced, even with respect to the trial work issue. In each of those cases, the individual was unable to work for a period of 12 full months. See pp. 2-3, *supra*. They do not hold that an individual like respondent, who returned to substantial gainful activity in less than 12 months and before his claim was adjudicated, is "entitled" to benefits and thus to a trial work period as well.

In any event, respondent's defense of the court of appeals' decision on this issue is unpersuasive. Respondent's primary contention is that, under the Commissioner's rule, whether or not a particular applicant is entitled to benefits may depend in part on when the claim is adjudicated. Br. in Opp. 28. But that is a necessary consequence of Congress's decision to accommodate two distinct goals: (1) that the disability programs should not result in the payment of benefits in cases of short-term, temporary disability, and (2) that claimants whose impairments will prevent them from engaging in substantial gainful activity for at least a year should not be required to wait a full year before they can receive

[6] The court of appeals' decision on the second question would conflict with *Cieutat* v. *Bowen*, 824 F.2d 348 (5th Cir. 1987), even if the issues were wholly independent of each other. See Pet. 23 n.8. Although respondent characterizes *Cieutat* as holding only that trial work could not occur before the application for benefits was filed, Br. in Opp. 29, that is incorrect. The Fifth Circuit held that, under the Act, services rendered during a period of trial work shall be deemed not to have been performed by an individual "in determining whether his disability"—once established—"has *ceased*." 42 U.S. 422(c)(2) (emphasis added); 824 F.2d at 358-359. The Fifth Circuit thus emphasized that work done "after the alleged onset of disability" *can* be used to determine whether the claimant "ever became disabled" or "established an entitlement to benefits" in the first place. 824 F.2d at 358-359.

benefits. Congress sought to meet those goals by requiring that the disability *has lasted* or *can be expected to last* for at least 12 months. The Commissioner has reasonably construed the Act as requiring the adjudicator to resolve that issue based on the evidence available *at the time of the disability determination.* Where the disability determination takes place within 12 months of the alleged disability's onset, and the evidence shows that the impairment currently prevents substantial gainful activity, the adjudicator necessarily must make a prediction about the disability's expected duration. That prediction in some instances may prove wrong. But where the evidence shows, at the time of the adjudication, that the individual has *already* returned to substantial gainful activity, and did so within 12 months of the alleged disability's onset, there is no reason why the adjudicator should be precluded from relying on that fact as conclusive proof that the disability did not last (and thus cannot be expected to last) 12 months. Indeed, such evidence is routinely considered in other legal contexts. For example, if a plaintiff suing in tort for lost prospective wages returned to work before trial, the jury could take such post-injury conduct into account even though that evidence would not have been available had the trial taken place earlier. Similarly, there is no reason why the Commissioner should be barred from taking an applicant's return to work into account when determining whether the applicant is or was under a disability that has lasted or can be expected to last 12 months.

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For the reasons stated above, and in the petition for a writ of certiorari, it is respectfully submitted that the petition should be granted.

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JULY 2001